STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
IVANCREST ASSOCIATES	:	SUPPLEMENTAL DETERMINATION DTA NO. 810980
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:	

Petitioner, Ivancrest Associates, 1161 Meadowbrook Road, North Merrick, New York 11566, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On or about July 7, 1993, petitioner by its duly appointed attorney and representative, Margolin, Winer & Evens (James L. Tenzer, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel), signed a waiver of hearing and consented to have the matter determined upon stipulated facts, documents and briefs. On August 11, 1993, the Division of Taxation submitted its exhibits. On October 1, 1993, petitioner submitted the agreed Stipulation of Facts with attached exhibits. The last day for filing briefs was December 3, 1993, and petitioner's reply brief was filed on that date. After due consideration of the evidence and arguments, Carroll R. Jenkins, Administrative Law Judge, rendered his determination dated April 7, 1994. Petitioner filed an exception to the determination of the Administrative Law Judge. The Tax Appeals Tribunal ("the Tribunal") issued its decision dated January 19, 1995.

The Tribunal's decision affirmed the Administrative Law Judge with respect to that portion of the determination which (1) denied a step-up of original purchase price; (2) held that mortgage indebtedness was properly includable in total consideration; (3) found that petitioner's constitutional rights were not violated; and (4) concluded that the Division of Taxation's method of computing consideration, gain and the allocation of gain to each unit was proper (Matter of Ivancrest Assoc., Tax Appeals Tribunal, January 19, 1995; hereinafter "the Tribunal decision").

The Tribunal remanded the matter to the Administrative Law Judge for the issuance of a supplemental determination to address the following legal issues which were not addressed in the determination of April 7, 1994. The Tribunal retained jurisdiction pending issuance of this supplemental determination.

ISSUES

I. Whether the mortgage indebtedness to be allocated to the taxable units must be reduced to reflect actual and anticipated future amortization of the mortgages.

II. Whether petitioner is correct in its argument that no tax is due because: (a) its initial calculation of anticipated total consideration at the time of its first taxable sale did not exceed $1,000,000.00; and (b) its initial determination of anticipated total consideration does not, as yet, have to be recalculated since it has not reached the 50% sellout plateau.

FINDINGS OF FACT[1]

The parties do not disagree on the facts. Petitioner, Ivancrest Associates, 1161 Meadowbrook Road, North Merrick, New York 11566 (referred to herein variously as "petitioner," "sponsor" or "transferor") is the sponsor of a plan to convert to cooperative ownership, real property known as Rivercrest Apartments, 103 Gedney Street, Nyack, New York ("the property").

Petitioner acquired the property consisting of 94 apartment units for the sum of

[1]This supplemental determination is based on the facts in the record without taking further evidence or argument. Facts set forth in the determination of April 7, 1994, as modified by the Tax Appeals Tribunal's decision, are deemed a part of this supplemental determination, though not all are expressly set forth here unless deemed relevant to the issues.

$1,715,562.00 in June 1966.

On March 12, 1980, petitioner, as sponsor, caused 103 Gedney Owners, Inc., a cooperative housing corporation ("CHC"), to be incorporated in the State of New York. In May 1980, petitioner caused the CHC to submit for approval to the Attorney General of the State of New York, a plan for the sale of the CHC's shares to persons intending to purchase the cooperative's apartment units ("units"). The plan was approved and declared effective April 24, 1981.

On March 4, 1980, petitioner entered into an agreement to convey the property to the CHC. On September 16, 1981, pursuant to the March 4, 1980 agreement, petitioner conveyed the property to the CHC in exchange for: (a) the total proceeds from the sale of shares; (b) the remaining unsold shares; (c) a purchase money mortgage note; and (d) the CHC taking the property subject to the first mortgage. The amount paid to petitioner

by the CHC upon the transfer of the property was $4,936,276.00, computed as follows:

Cash		$1,550,961.00
Value of 14,917 unsold shares		924,400.00
Rome Savings Bank Mortgage Assumed by the CHC		1,260,915.00
Mortgage note from the CHC to petitioner	1,200,000.00	
TOTAL:		$4,936,276.00

The gains tax became effective March 28, 1983. After the effective date of the gains tax, petitioner sold shares representing interests in eight of the cooperative's residential apartments, but did not file gains tax forms or pay applicable tax to the Division of Taxation ("Division"). The Division wrote petitioner's attorney on December 1, 1988 advising him that petitioner, as sponsor of a cooperative housing plan, the shares of which have an aggregate value exceeding $1,000,000.00, was required by Article 31-B (§ 1447) of the Tax Law to file questionnaires, infra, with the Division at least 20 days prior to the date of each transfer. The letter went on to request that petitioner comply with these filing requirements.

On or about February 7, 1989, petitioner filed the required transferor's Real Property

Transfer Gains Tax Schedule of Original Purchase Price (DTF-700[9/85]). On the schedule of original purchase price, petitioner reported its price to acquire the property as $4,936,276.00 as computed above. It is noted that petitioner did not report the price it paid in 1966 ($1,715,562.00) as the cost of acquiring the property, but rather, the amount contracted for by the CHC upon petitioner's transfer of the property to the CHC.

On February 7, 1989 and February 16, 1989, petitioner filed Unit Submission Questionnaires for Cooperatives and Condominiums (DTF-702[9/85]). These unit submission questionnaires together reflect that the subject property contains 94 apartment units, which constituted 54,685 shares in the CHC. The unit submission questionnaire dated February 7, 1989 reported that 79 units (46,321 shares) had been sold for $2,152,564.00. Of the 79 units reported as sold, 78 units (45,749 shares) were shown as exempt from gains tax by virtue of having been sold prior to the effective date of the gains tax statute (March 28, 1983). The 79th unit (Unit 5A representing 572 shares) was sold subsequent to March 28, 1983 and was, thus, a taxable unit; however, said unit submission questionnaire reported that no tax was due on the sale of this unit. The unit submission questionnaire dated February 16, 1989 reported the transfer of seven taxable units (3,506 shares). Once again, petitioner reported that no tax was due on the transfer of these seven units. The remaining eight units, representing 4,858 shares, were reported as unsold. The cover letter from petitioner's representative, included with the questionnaire filed on February 7, 1989, stated, in pertinent part:

> "[W]e are enclosing the properly executed and notarized . . . forms in connection with the above-captioned matter reporting the transfer of 78 'grandfathered' units and one 'taxable' unit (i.e., a sale after March 28, 1983 which was not subject to a binding contract entered into prior to March 29, 1983).
>
> "Please note that since the transferor believed that 78 of the units previously sold were 'grandfathered' . . . that the 'total anticipated selling price,' as computed under 'safe harbor,' of the 16 'taxable' units was $473,778 (i.e., the $2,632,378 amount reported on Form DTF-701(6/85) . . . less the consideration includible therein attributable to the 'grandfathered' units in the amount of $2,158,600), which amount is less than one million dollars, and that the 'gain subject to tax' for any sales subsequent to March 28, 1983 was a loss, the Transferor, in good faith, did not previously file for such transfers and intended to file for the first transfer, if any, for which tax would become due" (emphasis in original).

In a March 15, 1989 letter from petitioner's representative, James L. Tenzer, to the

Division, Mr. Tenzer urged that since petitioner's transfer of the property to the CHC occurred on September 16, 1981 and prior to the effective date of the gains tax, the original purchase price ("OPP") of the property must be "stepped-up" to the $4,936,276.00 contract amount set forth in petitioner's contract with the CHC. Further, petitioner urged that since the amounts represented by the Rome Savings Bank Mortgage ($1,260,914.00) and the mortgage issued by the CHC to petitioner ($1,200,000.00) were received by petitioner on September 16, 1981, prior to the March 28, 1983 effective date of the Tax Law's gains tax provisions, such mortgage amounts are "grandfathered" and cannot be included in computing total consideration for gains tax purposes.

The Real Property Gains Tax Questionnaire (DTF-701[6/85]) filed by petitioner on February 7, 1989 reported actual gross consideration (up to that time) of $2,152,564.00, estimated additional gross consideration upon the sale of remaining shares of $216,778.00, and total anticipated (actual plus estimated) gross consideration of $2,369,342.00 once all shares have been sold. This form indicated, inter alia, as the "Amount Anticipated for Mortgage Amortization" (Section III, Part B, Line 6), the number zero ($-0-). This form indicates that total anticipated consideration under the plan was computed using the actual selling price for the 79 units reported as sold on the unit submission questionnaire dated February 7, 1989 ($2,152,564.00) and "safe harbor" estimates for the 15 unsold units (15 units representing 8,364 shares multiplied by "safe harbor" estimate of $49.83 per share equals $416,778.00 less $200,000.00 for working capital fund produces the estimated consideration figure of $216,778.00). Exhibit "C" attached to this questionnaire stated, in relevant part:

> "The Transferor respectfully asserts that the entire amount of $2,460,914.00 in mortgage indebtedness (the 'Mortgage Amount') is 'exempt' and, therefore, should be excluded from 'gross consideration' . . . . The sale of the Property and the 'receipt' by the Transferor of the Mortgage Amount . . . occurred on September 16, 1981, which was before the effective date (i.e., March 19, [sic] 1983) of the 'gains' tax . . . . The Transferor respectfully asserts that the entire Mortgage Amount is 'grandfathered.' Accordingly, the Mortgage Amount should be excluded from 'gross consideration,' which is consistent with the treatment of 'grandfathered' transfers of interests in real property prior to March 29, 1983."

The Division conducted an audit of petitioner's sales of cooperative units under the

offering plan. The full list of actual post-March 28, 1983 sales by petitioner determined upon audit and upon which tax has been asserted in this case, are as follows:

Unit	Shares	Sale Price	Closing Date
5A	572	$ 57,000.00	July 22, 1983
6B	600	132,000.00	March 15, 1987
1E	467	105,000.00	August 4, 1986
1G	387	30,960.00	August 29, 1985
4G	490	80,000.00	May 9, 1986
LJ	400	40,000.00	August 29, 1985
LK	590	67,500.00	January 14, 1986
5P	572	93,500.00	January 14, 1986
TOTALS:	4,078	$605,960.00	

The Division determined that the total anticipated gross consideration to be received by petitioner for the 16 taxable units was $1,217,488.00. This amount was computed as follows:

Actual consideration for eight units sold after March 28, 1983	$ 605,960.00	
Estimated consideration for eight unsold units (4,858 shares x $49.83 "safe harbor" estimate)		242,074.00
Portion of mortgage indebtedness attributable to taxable units and, as such, includable in consideration (8,936 taxable shares / 54,685 total shares x $2,460,914.00 mortgages)		402,134.00
Less portion of working capital fund attributable to taxable units (8,936 / 54,685 x $200,000.00)	(32,680.00)	
Anticipated gross consideration		$1,217,488.00

The Division's audit determined that the portion of total original purchase price attributable to the eight units sold, plus the eight units yet to be sold, after the March 28, 1983 effective date of the gains tax, was $336,558.00. The Division's audit disallowed petitioner's brokerage fees for lack of substantiation.

As a result of the Division's audit, a Statement of Proposed Audit Changes was issued to petitioner on May 4, 1989, asserting real property gains tax in the amount of $40,201.74, plus penalty and interest. A Notice of Determination asserting this real property gains tax, plus penalties and interest, was issued to petitioner on September 25, 1989. Petitioner disagreed with the tax asserted and timely filed a request for a Conciliation Conference with the Division's

Bureau of Conciliation and Mediation Services ("BCMS").

At the BCMS conference, petitioner produced additional documentation to substantiate actual and anticipated brokerage fees in the amount of $53,213.00. In addition, the conferee allowed additional amounts for capital improvements. As a result, Conciliation Order No. 101444 was issued April 10, 1992 reducing the tax asserted to $36,672.63, plus penalty and interest.

The gains tax remaining in dispute in this proceeding is based solely upon sales occurring after the March 28, 1983 effective date of the gains tax, and is computed as follows:

Actual Consideration (8 units=4,078 shares)		$ 605,690.00
Estimated Consideration (8 unsold units = 4,858 shares x $49.83)	242,074.00	
Mortgage Indebtedness (8,936/54,685 x $2,460,914.00)	402,134.00	
Less Working Capital Fund (8,936/54,685 x $200,000.00)		(32,680.00)
TOTAL ANTICIPATED GROSS CONSIDERATION: $1,217,218.00		
Less actual brokerage fees:		(26,489.00)
Less estimated brokerage fees:		(26,724.00)
Less capital improvements allowed:	(24,120.00)	
Less Original Purchase price allocated to 8,936 shares:		(336,558.00)
TOTAL ANTICIPATED GAIN (on 16 Units equalling 8,936 shares):	$ 803,717.00	
Gains Tax at 10%:		$ 80,359.70
Taxable shares = 8,936		
Tax Per Share = 8.9928		

Unit No.	Shares	Closing Date	Tax/Share	Tax Due
5A	572	July 22, 1983	8.9928	$ 5,143.88
6B	600	March 15, 1987	8.9928	5,395.68
1E	467	August 4, 1986	8.9928	4,199.64
1G	387	August 29, 1985	8.9928	3,480.21
4G	490	May 9, 1986	8.9928	4,406.47
LJ	400	August 29, 1985	8.9928	3,597.12
LK	590	January 14, 1986	8.9928	5,305.75
5P	572	January 14, 1986	8.9928	5,143.88
	4,078	Gains Tax Asserted		~~$36,672.63~~

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that the Division can only include the amortized value (i.e., the remaining principal balances) of its mortgages at the time the taxable units were transferred as part of gross consideration.

Petitioner also argues that no tax is due here since total anticipated gross consideration at the time of its initial taxable sale did not exceed the $1,000,000.00 threshold and that no update is required because it has not yet reached the 50% sellout plateau.

CONCLUSIONS OF LAW

A. I first address whether the mortgage indebtedness to be included in gross consideration must be reduced to reflect the actual amortization to date and anticipated future amortization until the sale of the remaining unsold shares.

B. Tax Law § 1441 imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State.

C. Tax Law § 1440(3) defines "gain" as the:

> "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price."

Tax Law § 1440(5)(a)(i) defines "original purchase price" to mean:

> "the consideration paid or required to be paid by the transferor (A) to acquire the interest in real property, and (B) for any capital improvements made or required to be made to such real property . . ." (emphasis added).

"Consideration", in turn, is defined by Tax Law § 1440(1)(a) to mean:

> "the price paid or required to be paid for real property or any interest therein . . . . Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or encumbrance, whether the underlying indebtedness is assumed or taken subject to" (emphasis added).

As the statute recites, consideration includes the amount of a mortgage, meaning its face amount and not its present value or other value (Matter of Normandy Associates, Tax Appeals Tribunal, March 23, 1989; see also, Matter of Old Farm Lake Company, Tax Appeals Tribunal, April 2, 1992). Consideration is determined at the time of transfer to the unit purchasers (Matter of Cheltoncort Co. (Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592

NYS2d 121 [3d Dept 1992]). However, the Division's regulations (20 NYCRR 590.37) provide, in relevant part, that:

> "Where the real property was transferred to the cooperative corporation prior to March 29, 1983, subject to a mortgage, or a mortgage was taken back by the realty transferor, the total amount of any notes or bonds secured by such mortgages is also allocated to the shares sold by the cooperative corporation and to the shares which the realty transferor took back. To the extent these shares are sold pursuant to the cooperative plan on or after March 29, 1983, the amount of the notes or bonds secured by such mortgages allocated to such shares, reduced by the amount of the payments of principal made by the realty transferor with respect to such shares, is included as consideration to the realty transferor for the purpose of computing the tax."

D. So, petitioner is correct when it says that mortgage debt can be included in computing "consideration" only to the extent of the unpaid principal balance of such debt.[2] However, while petitioner's legal argument is sound, its evidence is weak. Petitioner has not presented clear and convincing evidence of its mortgage amortization. I note, in particular, that petitioner's gains tax transferor questionnaire (DTF-701[6/85]) filed in 1989 indicated zero ($-0-) as the "Amount Anticipated for Mortgage Amortization" (Section III, Part B, Line 6). Petitioner's evidence in this proceeding does include a "summary" of the first and second mortgages, but there is nothing in this record to enable the trier of fact to determine, at any given point in time, what the remaining principal balances are on these debts, e.g., an amortization schedule. There is no way of knowing at any given time how many payments, if any, had been missed, or whether there have been mortgage modification agreements or changes in interest rates. While I might be able to make an "estimate" of petitioner's balances at a given point, my estimates are no more probative than petitioner's. It was petitioner's burden to demonstrate such payments if it wishes to avail itself of them. Since petitioner has failed to meet its burden on this issue, there is no basis for modifying the Division's calculation as to the amount of amortized mortgage debt properly includable in consideration.

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[2]Indeed, the Division's Form DTF-701 (6/85), Real Property Transfer Gains Tax Questionnaire for Cooperatives and Condominiums, at Section III, Part B, makes provision for a transferor to report the amount of its anticipated mortgage amortization.

E. I next address petitioner's claim that no tax is due since total anticipated consideration at the time of its initial taxable sale did not exceed the $1,000,000.00 threshold. Petitioner bases it argument here on its claimed right to file under Option B. Petitioner says that the transfer of the initial taxable shares, as well as the transfer of the other taxable shares sold to date, was exempt from gains tax since "consideration" was less than $1,000,000.00. In fact, says petitioner, no gains tax will be due (using Option B) until at least 50% of its unit shares are sold.

F. Tax Law §§ 1442 and 1443(1) require a person making sales pursuant to a cooperative plan to begin paying tax on the transfer of the first unit, if the consideration to be received pursuant to the entire plan will exceed $1,000,000.00. Since the exact amounts of consideration and original purchase price to calculate the actual gain received pursuant to the plan may not be known until far in the future, the transferor of shares must necessarily estimate the total tax that will be due and allocate it to each transfer as it is made (Matter of Normandy Assoc., Tax Appeals Tribunal, March 23, 1989).

Petitioner argues that the Division improperly totalled the actual consideration received on the eight taxable units that have been sold ($605,960.00)[3] with the estimated consideration to be received on the remaining eight units. Petitioner argues that no tax is due, since at the time it sold its eight taxable units, its actual consideration did not equal the $1,000,000.00 threshold for requiring payment of gains tax. Petitioner

argues that the Division should not have included the estimated consideration from the eight unsold units in computing total consideration.

G. Petitioner's argument is rejected. The Division issued guidelines on August 22, 1983 (TSB-M-83-[2]-R) which set forth two options, A and B, to estimate gain on cooperative and condominium plans. Under Option A, gain was computed based on the actual consideration received less the pro rata portion of original purchase price allocated to each unit.

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[3]Finding of Fact "11".

Under Option B, a taxpayer could elect to estimate the consideration to be received on all future sales.

Under Option B, petitioner could have elected when it started making taxable transfers to estimate the consideration to be received on all future sales. Under an Option B election, payment of tax based on this estimate could have continued until petitioner sold 25% of its taxable shares, at which time petitioner would have been required to adjust its estimated consideration to reflect the actual consideration received on the completed sales. Even if the estimate for the first 25% was less than the consideration that was actually received on the transferred units, the Option B election would have protected petitioner from the imposition of penalty or interest on the underpayment. The amount of underpaid tax, under Option B, would be made up during the sellout of the remaining units as the anticipated consideration was adjusted based on the actual consideration at 25%, 50%, 75% and 100% sell out points. However, petitioner did not report the eight taxable transfers, file returns for the eight taxable transfers, or elect any method of reporting (i.e., then available Option A or Option B) when the transfers were made or pay any tax on such transfers. By failing to file gains tax returns, schedules and questionnaires until 1989, petitioner waived its right to elect either Option A or Option B. Having waived its right to elect Option B, petitioner cannot now avail itself of the argument that it has not reached the 50% sellout point (which applied only to Option B) as a basis of avoiding the tax here.

Further, it is petitioner's failure to timely elect Option B, and to file returns, that has left it vulnerable to the Division's calculation upon audit. So long as the Division's calculation is reasonable, it will not be disturbed.

Under these circumstances, the Division's method of calculating total anticipated gross consideration by including actual consideration received plus estimated future consideration was proper. As thus calculated by the Division, petitioner's total anticipated gross consideration exceeds the $1,000,000.00 threshold.

H. On audit, the Division calculated gain and tax due using the actual consideration

received on the eight sold units plus estimated consideration for the eight unsold units plus the pro rata portion of the mortgages allocated to the 16 taxable units minus pro rata portions of the working capital fund and the original purchase price allocated to the taxable units. The Tribunal has concluded that the Division's method of calculating gain and tax due on audit was reasonable, and in harmony with determining whether the cooperative conversion is taxable based on whether consideration anticipated on taxable units alone reaches the $1,000,000.00 threshold (Matter of Ivancrest Assoc., Tax Appeals Tribunal, January 19, 1995).

I. The petition of Ivancrest Associates is denied and the Notice of Determination dated October 5, 1989, as adjusted by Conciliation Order No. 101444, is sustained.

DATED: Troy, New York
June 1, 1995

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE